

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 24, 2008 Session

**JIMMY LESLIE SLUDER v. JACK MORGAN, WARDEN AND
STATE OF TENNESSEE**

**Appeal from the Criminal Court for Morgan County
No. 9126 E. Eugene Eblen, Judge**

No. E2007-01381-CCA-R3-HC - Filed August 5, 2008

The Petitioner, Jimmy Leslie Sluder, appeals the Morgan County Criminal Court's summary dismissal of his petition for a writ of habeas corpus. The Petitioner was convicted by a jury of second degree murder and pled guilty to aggravated assault, two counts of leaving the scene of an accident involving personal injury, and driving on a revoked license. The focus of the Petitioner's argument is that he was improperly sentenced as a Range II offender and that the trial court erred by applying enhancement factors not found by a jury. In prior decisions of this Court, we addressed this precise claim of the Petitioner and determined it to be without merit. We affirm the order summarily dismissing the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Robert L. Vogel, Knoxville, Tennessee, for the appellant, Jimmy Leslie Sluder.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Russell Johnson, District Attorney General; and John Bledsoe, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

This is the Petitioner's fifth time before this Court since he was convicted by a jury of second degree murder and pled guilty to aggravated assault, two counts of leaving the scene of an accident involving personal injury, and driving on a revoked license. For these convictions, he received an effective sentence of fifty-six years. The procedural history has been succinctly set out by this Court in three prior decisions. See State v. Jimmy L. Sluder, No. 1236, 1990 WL 26552 (Tenn. Crim. App., Knoxville, Mar. 14, 1990) (the Petitioner filed a direct appeal arguing, among other things, that the evidence was insufficient to support his second degree murder conviction and that his

sentence was excessive), perm. to appeal denied (Tenn. July 16, 1990); Jimmy Leslie Sluder v. State, No. 03C01-9605-CR-00184, 1997 WL 81661 (Tenn. Crim. App., Knoxville, Feb. 27, 1997) (the Petitioner sought post-conviction relief alleging ineffective assistance of counsel), perm. to appeal denied (Tenn. July 7, 1997); Jimmy Leslie Sluder v. State, No. E2003-02222-CCA-R3-PC, 2004 WL 1414032 (Tenn. Crim. App., Knoxville, June 24, 2004) (the Petitioner filed a habeas corpus petition primarily arguing that the trial court improperly instructed the jury on second degree murder rather than vehicular homicide and that the fifty-year sentence for second degree murder was illegal because the other convictions, to which he pled guilty, enhanced his range of punishment), perm. to appeal denied (Tenn. Dec. 20, 2004). See also Sluder, 2004 WL 1414032, at *1 (post-conviction court denied the Petitioner's request to reopen his post-conviction petition claiming that he was impermissibly sentenced as a Range II offender based on facts not set forth in the indictment or submitted to the jury, and this Court denied application to appeal).

On February 18, 2005, the Petitioner filed the instant petition for habeas corpus relief. The State filed a motion for summary dismissal on March 11, 2005, seeking dismissal of the petition on the basis that the Petitioner had failed to set forth any allegations that the trial court was without the jurisdiction or authority to sentence the Petitioner or that his effective fifty-six-year sentence had expired.

The petition was later amended on May 17, 2007. The crux of his argument was again that the trial court erred by sentencing him as a Range II offender and by applying enhancement factors not found by a jury in violation of Blakely v. Washington, 542 U.S. 296 (2004). Following a hearing, the habeas corpus court stated that the issue had "already been adjudicated." The court then granted the State's motion and dismissed the petition by order dated June 18, 2007. It is from this order of dismissal that the Petitioner now appeals.

ANALYSIS

The determination of whether to grant habeas corpus relief is a question of law and our review is de novo. See State v. Summers, 212 S.W.3d 251, 262 (Tenn. 2007). The Tennessee Constitution guarantees a convicted criminal defendant the right to seek habeas corpus relief. See Tenn. Const. art. I, § 15. However, the grounds upon which habeas corpus relief will be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). A petition for habeas corpus relief may only be granted when the judgment is shown to be void, rather than merely voidable. Id. A judgment is void only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that the convicting court was without jurisdiction or authority to sentence a defendant or that a defendant's sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). On the other hand, a voidable judgment or sentence is one which is facially valid and which requires evidence beyond the face of the judgment or the record of the proceedings to establish its invalidity. Taylor, 995 S.W.2d at 83. A petitioner bears the burden of establishing a void judgment or illegal confinement by a preponderance of the evidence. Hogan v. Mills, 168 S.W.3d 753, 755 (Tenn. 2005). Moreover, it is permissible for a court to summarily dismiss a habeas corpus petition, without the appointment of counsel and without an evidentiary hearing, if there is nothing on the face of the record or judgment to indicate that the convictions or sentences addressed therein are void. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994).

The Petitioner again asserts that his sentence was illegally enhanced to a Range II classification. This issue has already been addressed.

On direct appeal, the Petitioner argued that he was sentenced within the wrong range and that he should have received the benefit of the Tennessee Criminal Sentencing Reform Act of 1989. Sluder, 1990 WL 26552, at *6. This Court determined that the Petitioner's sentence was proper:

Equally specious is the argument that the [Petitioner] should be sentenced pursuant to the Tennessee Criminal Sentencing Reform Act of 1989 because this Court is required to conduct a de novo review. The record reflects the [Petitioner] was sentenced for the offense of murder in the second degree and aggravated assault more than a year before the new act became effective. Thus, the Tennessee Criminal Sentencing Reform Act of 1982 is applicable to this case; and we are required to review the two felony sentences pursuant to Tenn. Code. Ann. § 40-35-402(d) (Supp. 1988). The recent decisions of this Court are consistent with our determination of this question.

The trial judge properly found that the [Petitioner] committed especially aggravated offenses which justified the imposition of Range II sentences. Contrary to the [Petitioner's] argument, the trial judge did not impose the Range II sentences because the offense involved two separate victims. This issue is governed by our decision in State v. Hammons.

We conclude from our de novo review that the sentences imposed by the trial judge are appropriate, and we adopt the sentences. The sentences imposed are no greater than that deserved for the offenses, and the sentences are the least severe measure necessary to achieve the purposes for which the sentences were imposed.

Id. (footnotes omitted).

The Petitioner then sought to reopen his post-conviction petition, claiming that he was impermissibly sentenced as a Range II offender based on facts not set forth in the indictment or submitted to the jury in contravention of the ruling in Apprendi v. New Jersey, 530 U.S. 466 (2000). Sluder, 2004 WL 1414032, at *1. The post-conviction court refused to reopen the petition because Apprendi did not apply retroactively on collateral review, and this Court denied the Petitioner's application to appeal. Id. Moreover, we note that this Court has recently concluded that an Apprendi/Blakely type violation does not provide grounds for habeas corpus relief because Blakely does not apply retroactively to cases on collateral attack. See James C. Murray v. James Fortner, Warden, No. M2007-01395-CCA-R3-HC, 2008 WL 2229134, at *2 (Tenn. Crim. App., Nashville, May 30, 2008) (citations omitted).

As a ground for relief in his first habeas corpus petition, the Petitioner challenged his sentence arguing that his fifty-year sentence for second degree murder was illegal because the other convictions, to which he pled guilty, enhanced his range of punishment. Sluder, 2004 WL 1414032, at *2. This Court concluded that the Petitioner had no claim for habeas corpus relief, citing to this

Court's opinion on direct appeal determining that the trial court had properly found that the Petitioner had committed especially aggravated offenses. Id. at *3 (citing Sluder, 1990 WL 26552, at *6). In affirming dismissal of the petition, this Court stated as follows:

In our view, the [P]etitioner has failed to set forth any allegations that would indicate that the trial court lacked jurisdiction to enter a judgment of conviction or sentence. The record demonstrates that the sentence has not expired. None of the claims address the facial validity of the judgment or the jurisdiction of the convicting court. The appropriate manner for challenging a voidable judgment is through a petition for post-conviction relief. In this instance, the [P]etitioner has exercised his entitlement to seek post-conviction relief and he has failed.

Id.

Following our review, we conclude that the Petitioner's judgments of conviction are valid upon their face. The sentence of confinement has not expired. The Petitioner's argument has been previously decided, and we concur with the previous decisions of this Court.

CONCLUSION

The Petitioner has failed to present any evidence that his sentence has expired or that his conviction is void. Accordingly, the judgment of the habeas corpus court summarily dismissing the petition for a writ of habeas corpus is affirmed.

DAVID H. WELLES, JUDGE